Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Accipiter Communications, Inc. and Qwest Corporation Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules	)	CC Docket No. 96-45

APPLICATION FOR REVIEW

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SUMMARY

The Wireline Competition Bureau ("Bureau" or "WCB") denied the Joint Petition of Accipiter Communications and Qwest Corporation for waiver of the Commission's "frozen study area" rule based on its determination that the waiver was not in the public interest. This application for review respectfully submits that the Order is inconsistent with Commission precedent on such orders. Further, this application emphasizes the multiple public interest gains that would accrue from a grant of the waiver. Among these:

1. The sole purpose of the "frozen study area" rule is to control the growth of the USF. Grant of the waiver would not have increased the USF at all so no Commission policy or purpose was served by the denial.
2. Grant of the waiver will produce viable wireline competition for telecommunications and broadband services. Certainly this benefits the residents and businesses in the area, as well as indirectly benefiting Accipiter's rural customers by providing the company the benefits of better economies of scale. The latter consumers reside in the 99% of Accipiter's service area which lies outside of the four square mile area subject to the order..
3. The state commission explicitly found that it was in the public interest for Accipiter to become the ILEC and ETC in the subject area and repeatedly urged the Commission to grant the waiver.

4. The Order creates an unprecedented regulatory situation that will cause a small company to bear significant regulatory and accounting burdens and uncertainties.

Ironically, if the Commission does not reverse the Bureau's order the result is that the residents of the area will remain in effect victims of a wireline monopoly which was undone after lengthy and expensive intervention by Accipiter, the U.S. Department of Justice, and the Arizona Corporation Commission. This result serves the interest of the CLEC at the expense of the public.

Accipiter and Qwest relied on more than twenty years of Commission decisions and expended a very substantial amount of resources in the reasonable expectation that they would receive similar treatment. Accipiter has even offered to forgo USF to eliminate the Bureau's expressed public interest concerns. Accipiter requests that the Commission act expeditiously to end what has been a long nightmare for a very small company.

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I INTRODUCTION AND BACKGROUND

A. Issues Presented

Accipiter Communications, Inc. ("Accipiter") respectfully requests the Commission on review to reverse the Order of the Wireline Competition Bureau ("Bureau" or "WCB") denying the Joint Petition of Accipiter and Qwest Corporation ("Qwest") for waiver of the Commission's "frozen study area" rule and to grant the Petition.[1] The Order enforces a rule intended to control increases in Universal Service Fund ("USF") support in circumstances where there will be no such increase because

[1] *Accipiter Communications, Inc. and Qwest Corporation, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules,* Order, DA 10-1675, Sep. 1, 2010 ("Bureau Order" or "Order").

Accipiter expressly agreed to forgo support in the subject area. The Order precludes achievement of multiple public interest benefits and conflicts with established precedents

The essence of the issue presented is *whether* two incumbent local exchange carriers, with the express blessing of the state commission, should be allowed to realign their service area boundaries better to serve the public where the realignment will not increase USF support and no other contrary federal interest is identified.

B. The Public Interest Would Be Served by Grant of a Study Area Waiver Where There Will Be No Increase in Universal Service Support

The Bureau Order recognizes that the Joint Petition meets the first two prongs of the established three-prong test for grant of a waiver of the freeze of study area boundaries.[2] There will be no increase in USF support and the state commission supports grant of the waiver. The Bureau, however, was not persuaded that grant of the Petition would be in the public interest.[3] Accipiter respectfully disagrees and will demonstrate in detail in the following sections the public interest benefits that would flow from a grant of the Petition. The specific public interest factors supporting grant of the Petition include:

1. Accipiter, without USF support, will provide wireline broadband and telecommunications services in competition with the established carrier to the benefit of subscribers, consistent with the goals of the National Broadband Plan.

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[2] *U S West Communications and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* Memorandum Opinion and Order, 10 FCC Rcd 1771 (1995) ("*U S West/Eagle Order")*

[3] Order at para. 11.

Without the waiver, Accipiter will be required to give serious consideration to withdrawing from the area.

2. By adding lines in a much higher density, lower cost area, Accipiter's average cost per line will significantly decrease.

3. Accipiter and its customers, subscribers and IXCs, will benefit from the cost savings and lower rates available through NECA participation.[4]

4. Accipiter's cost accounting will be more accurate and less burdensome allowing more accurate determination of just and reasonable rates.

5. The expressed preference of the state commission for the ordering of exchange boundaries within its jurisdiction will be honored consistent with appropriate comity requirements.

6. The subscribers in the subject area will be within the designated area of an Eligible Telecommunications Carrier.

7. Accipiter's lines within the subject area will come within the pro-competitive requirements of Section 251(c) of the Act, which cannot be applied to the existing carrier, Cox. [5]

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[4] *See Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained inPart 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules,* CC Docket No. 96-45, Order, 20 FCC Rcd 8999, para. 28 (Wir. Comp. Bur. 2005) App. for Rev. pending("Sandwich Isles Order")

[5] *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It To Be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2),* Report and Order, 21 FCC Rcd 11506 (2006) para. 18.

Like Mid-Rivers, Accipiter cannot speculate as to its response to a Section 251(c) interconnection request.

8. The Commission will have an opportunity to reinforce its policies against anti-competitive agreements between carriers and developers

C. Historical Background

In 1995 Accipiter purchased for $1.00 a territory of 700 square miles in west central Arizona from U S West (now Qwest). A Joint Petition for a study area waiver was filed in March of 1996 and granted in November of that year.[6] Accipiter then proceeded to extend service to subscribers in a very low-density area that was then mostly without any local telephone service. In 2002, following a request from the Vistancia developer that the development be served by a single ILEC, Accipiter applied to the ACC to expand its certificated area to include the South Vistancia area. Qwest subsequently agreed to removal of the area from its certificated area. In February 2005 the ACC granted the application and revised the ETC designated areas accordingly.[7]

Accipiter was then confronted with the fact that the developer and Cox Communications had an agreement that effectively precluded any other telecommunications service provider from entering the development. Accipiter filed a complaint with ACC. After the Antitrust Division of the U.S. Department of Justice

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[6] *Petitions for Waivers Filed by Accipiter Communications, Inc. and U S West Communications, Inc.* Memorandum Opinion and Order, 11 FCC Rcd 14962 (1996)

[7] *Application of Accipiter Communications, Inc. to Extend Its Certificate of Convenience and Necessity in Maricopa County,* Doc. No. T-02847A-02-0641, Opinion and Order, Decision No. 67574 ("ACC Certification Order"), The proposed addition to Accipiter's certificated area consists of four square miles, of which South Vistancia occupies approximately one half. The remainder of the area is largely uninhabited.

issued a Civil Investigative Demand, Cox and the developer agreed in November 2005 to eliminate the restrictions. Accipiter then withdrew its complaint, however the ACC conducted an investigation and levied a fine of $2 million on Cox.[8] By then, however, Cox had constructed substantial telecommunications facilities in South Vistancia and most of the utility trenches had been closed.

Accipiter and Qwest filed the instant Joint Petition for waiver of the study area freeze in June 2006.[9] The Petition demonstrated that it met all three of the long established criteria for grant of such a waiver, including that the additional USF support would be substantially less than one percent of the then national total. Over the next 18 months, the Bureau requested additional estimates of USF impact for subsequent years and under different scenarios. Responding to these requests required considerable resource expenditure by a small company, despite the clear precedent that the impact is to be measured only in the year of filing[10] and despite the fact that under no possible scenario would the impact approach the one percent ceiling.

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[8] *See, In the Matter of the Formal Complaint of Accipiter Communications, Inc., Against Vistancia, LLC, and Cox Arizona Telcom, LLC* (Docket T-03471A-05-0064). The relevance of this complaint proceeding is discussed in Section V B 4, *infra.*

[9] In April 2009 Accipiter and Qwest filed a second study area waiver application with respect to further realignment of the companies' boundaries unrelated to the current Petition. *See,* Public Notice released June 5, 2009, DA 09-1266, Comment Sought on Joint Petition of Accipiter Communications, Inc. and Qwest Corporation to Waive the Study Area Boundary Freeze As Codified in Part 36 of the Commission's Rules. There are no CLECs in the areas covered by this Petition.

[10] In applying the one-percent guideline, the Commission looks at the estimated support on an annualized basis at the time the waiver request is submitted, and does not attempt to estimate future support amounts. *SRT Communications, Inc. and North Dakota Tel. Co., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules,* Order (WCB 2007) para. 5; Sandwich Isles Order, para 17.

In February 2008, the Bureau advised Accipiter that it believed Accipiter should not be eligible for any USF support in the new area, regardless of the one percent rule, because telecommunications service was available throughout the development from Cox that did not receive USF support. Accipiter continued to discuss the question with Bureau staff over the next two years. In February 2010 Accipiter therefore advised the Bureau that it would accept a grant of the waiver conditioned upon its being ineligible for High Cost Loop or Local Switching Support in the South Vistancia development.[11] Accipiter cited as precedent for such a condition two previous study area waiver grants conditioned upon the carriers' agreement to treat the area "as if" Section 54.305 applied, even though it did not.[12]

Within a few days, the Bureau asked whether Accipiter would accept the USF condition throughout the four square miles. Accipiter responded affirmatively.[13] Accipiter made several subsequent unsuccessful requests for meetings but heard nothing further from the Bureau until the end of August 2010 when the Bureau advised that the Petition remained unacceptable because Accipiter had not renounced any right to ICLS

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[11] Letter from David Cosson, Counsel to Accipiter to Marlene H. Dortch, FCC, March 1, 2010. CC Doc. No. 96-45.

[12] *Heart of Iowa Communications Cooperative and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules,* Order, FCC 06-29, 21 FCC Rcd 2858 (2006); *Partner Communications Cooperative and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* Order, DA 06-944, 21 FCC Rcd 4406 (WCB 2006). ("Heart of Iowa and Partner Orders"). Recently the Bureau approved a Verizon-Frontier study area request conditioned upon Verizon's agreement to forego safety valve support. *Verizon California Inc., Verizon South Inc., and Frontier Communications Corporation, Joint Petition for Waivers of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* 25 FCC Rcd 7246 (2010) ("Verizon-Frontier Order")

[13] Letter from David Cosson, Counsel to Accipiter to Marlene H. Dortch, FCC, March 19, 2010, CC Doc. No. 96-45.

support. Accipiter was unaware this was a concern, but immediately agreed to forgo ICLS as well. A few days later the Order was nevertheless released, denying the Petition.[14]

II THE BUREAU ORDER IS CONTRARY TO LONG ESTABLISHED PRECEDENT, IS INCONSISTENT WITH THE PURPOSE OF STUDY AREAS, AND CREATES UNNECESSARY BURDENS AND ACCOUNTING CONFUSION

Accipiter and Qwest completed the extensive state commission proceeding and then filed their waiver petition in justifiable reliance on the fact that over the last 25 years, the Bureau has been presented with scores of study area waiver petitions, almost all of which have been granted upon findings that there would be no adverse impact on the Universal Service Fund.[15] Several of these waiver grants involved no USF impact, but unlike the Accipiter-Qwest Petition, they were routinely granted.[16] The Order does not explain why the Bureau believes it is in the public interest to enforce a rule in

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[14] Order at para. 12. Although the Bureau took over four years to act on the Accipiter Qwest waiver, the Verizon-Frontier waiver petition was filed January 20, 2010 and granted June 4, 2010, less than six months. 25 FCC Rcd 7246 (WCB 2010).

[15] A partial list of previous waiver grants involving Qwest (and its predecessor, U S West) is provided in Attachment A.

[16] *See, e.g., Federal-State Joint Board on Universal Service, DuBois Telephone Exchange, Inc. Qwest Corporation, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commissions Rules*, Order, 24 FCC Rcd 5549 (WCB 2010), para. 8 ("The Petitioners state that DuBois will not receive additional universal service support as a result of this transaction."). *Petitions for Waivers Filed by Baltic Telcom Cooperative, Inc. East Plains Telecom, Inc. and U S West Communications, Inc. Concerning Sections 69.3(e)(11), 69.3(i)(4), 69.605(c) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rule*s, Memorandum Opinion and Order, 12 FCC Rcd 2433 (1997), para. 8 ("Specifically, petitioners state that neither U S WEST nor Baltic currently receives USF support for their South Dakota study areas and that neither U S WEST, Baltic, nor East Plains will receive USF support after the acquisition")

circumstances that do not implicate the purpose of the rule in any way and which it has routinely waived.

A. Definition and Function of Study Areas

The concept of Jurisdictional Separations refers to practice of separating the investment and expenses of a regulated utility into the components subject to the regulation of the federal and state jurisdictions respectively. The modern concept of separations in the telephone industry followed the Supreme Court's 1930 *Smith v. Illinois Bell* decision which held that where the same investment and expenses were incurred to provide services subject to multiple jurisdictions, there must be an allocation between the jurisdictions to preclude gaps or overlaps.[17]

The term, "study area" was adopted long ago by the industry to identify the area upon which a telephone company performed the separations calculations, however it was not defined in the early separations manuals published by NARUC. In April 1984 the Commission first codified the Separations Manual in Part 67 of the rule. The Glossary to Part 67 defined Study Area as: "A telephone holding company's operations within a single state."[18]

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[17] *Smith v. Illinois Bell Tel. Co.,*282 U.S. 133 (1930). (Separation between interstate and intrastate operations "is essential to the appropriate recognition of the competent governmental authority in each field of regulation.")

[18] *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* Decision and Order, CC Doc. No. 80-286, 96 FCC 2d 781, 876 (1984). The Commission had previously incorporated by reference a manual developed in cooperation with NARUC. The NARUC manual did not define "study area." Effective January 1, 1988, Part 67 was replaced by Part 36, which contains the same "definition" of study area.

B. Study Area Boundary Freeze Adopted to Control Growth in USF

In December 1984 the Commission, on the recommendation of the Joint Board, amended the definition to read: "Study area boundaries shall be frozen as they are on November 15, 1984."[19] The Joint Board recommendation and the Commission's Order were clear that the purpose of freezing study area boundaries was to prevent carriers from subdividing their study areas into high and low cost areas so as to maximize universal service support.

Throughout the long history of the industry, telephone companies have bought, sold, traded and otherwise adjusted their service areas amongst themselves. Until 1984 regulation of these adjustments was primarily conducted by the respective state Commissions, although some situations came with the requirements of Section 214 and were addressed by the Commission. One result of the freeze was that every such adjustment now required Commission approval. Consistent with the purpose of the

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[19] *MTS and WATS Market Structure, CC Docket No. 78-72, and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984) at 48337-38. *MTS and WATS Market Structure; Establishment of a Joint Board; Amendment of Part 67*, Decision and Order, CC Docket Nos. 78-72, 80-286, FCC 84-637, 50 Fed. Reg. 939 (1985) ("Freeze Order") To say that boundaries are frozen is not to define what the boundary encloses or represents: i.e., the statement is not a definition even though so labeled. ("To 'define' with respect to space, means to set or establish the boundaries authoritatively…." Black's Law Dictionary, Rev. 4th Ed., 1968) Neither the decision nor the revised "definition" provides any guidance as to how to determine what the boundaries actually were on the effective date of the freeze. The Commission did not and has not developed a database with a geographic description. Many states have information delineating the geographical areas for which ILECs are issued Certificates of Public Convenience and Necessity or similar certification, but these don't purport to be based upon or track either of the Commission's "definitions". The Accipiter-Qwest Petition did contain a legal description of the area transferred by the ACC certification order.

freeze to control growth in USF, the Commission granted study area waivers subject to the condition that any increase in universal service associated with a sale of exchanges may not exceed the amount estimated at the time. [20]

In 1995 the Commission adopted a three prong test to provide specific guidance for evaluation of study area waivers: (1) the resulting increase in USF must be less than one-percent, (2) the state commission must not object, and (3) the transfer must be in the public interest.[21]

C. Treatment of "unserved areas" clarified in *Skyline*[22]

It would perhaps be logical and consistent with normal cannons of construction to revert to the last actual definition of a study area, i.e., the carrier's operations within a state. Although it does not directly discuss the point, the Commission's 2004 *Skyline* decision appears to rely on state certificated boundaries as establishing study area

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[20] That limitation was subsequently removed, as were all remaining individual caps on high-cost loop support that had been imposed as part of the grant of study area waivers. *See Petitions for Waiver Concerning the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, Accent Communications, Inc. et al.*, Order, CC Docket 96-45, 15 FCC Rcd 23491 (Com. Car Bur. 2000); *Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(110 and the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, Filed by Copper Valley Telephone Company, et al.*, Memorandum Opinion and Order on Reconsideration, DA 99-1845 (CCB 1999).

[21] *U S West Communications and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* Memorandum Opinion and Order, 10 FCC Rcd 1771 (1995) ("*U S West/Eagle Order")*.

[22] *See* M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611,36.612, and 69.2(hh) of the Commission's Rules, CC Docket No. 96-45, Order, 19 FCC Rcd 6761 (2004).

boundaries even in areas where the carrier has never provided service.[23] Skyline, a new company formed to bring telephone service to previously unserved areas of Washington, believed that no waiver was needed to establish a new study area. The Commission rejected this argument, stating there was no exception to the waiver requirement for unserved areas and that treating an area as unserved when it was within an existing study area would be inconsistent with the purpose of the freeze.[24]

If all unserved areas within a carrier's state certificated area are considered part of the carrier's study area even though the carrier does not operate, have investment, expenses or revenues, then the prior definition of study area was apparently overruled *sub silento.* The *Skyline* Order does refer to the fact that Qwest and Verizon submitted boundary change filings to the state commission and the state subsequently revised the *exchange* boundaries of Qwest and Verizon.

Accipiter's circumstance was similar to Skyline's. Accipiter and Qwest filed the Joint Petition with the reasonable expectation that the matter would be expeditiously resolved. Accipiter, Qwest, the ACC and NECA all reasonably relied on the Commission's statement in *Skyline* that any such waiver request will be evaluated under the criteria set forth in the *U S West/Eagle Order* to ensure that the Commission has an opportunity to determine whether the creation of a new study area will have an adverse impact on the federal universal service fund[25].

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[23] *M&L Enterprises, Inc. d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612 and 69.2(hh) of the Commission's Rules,* Order, CC Doc. No. 96-45, 19 FCC Rcd 6761 (2004) ("*Skyline")*

[24] *Id. at para. 11.*

[25] *Skyline at para. 13.* Following release of the *Skyline* order, NECA announced it would not accept such lines in its pools without a waiver order from the Commission. NECA Cost/Average Schedule Issue Number 8.5, Revised Jan. 2006.

D. The Commission has recognized that for accounting, separations and rate making purposes, investment and expenses should be assigned to the study area of the carrier that incurs them and serves customers.

The Order recognizes that the ACC found Accipiter's CC&N extension request is in the public interest and approved the transfer of the area from Qwest to Accipiter.[26] From the ACC's perspective, the result of that order, and the reconfiguration of the ETC service areas of Accipiter and Qwest was that Accipiter became the carrier of last resort for all of the Vistancia development. For state reporting and rate regulatory purposes, Accipiter is thus required to determine the intrastate portion of its investment and expenses (as accounted for in Part 32, allocated in accordance with Part 64, and jurisdictionally separated according to Part 36 of the Commission's rules). The Order fails to acknowledge that such accounting will be at best very burdensome when the intrastate portion of the costs are for an ILEC and the interstate costs will follow CLEC procedures. The Order provides no explanation why the imposition of these burdens on Accipiter, and ultimately on consumers, is in the public interest.

From the beginning of rate regulation it has been understood by carriers and regulators alike that where investment and expenses are joint and/or common to multiple jurisdictions, the accounting and ratemaking process must be consistent. In 1990, the Commission adopted a Notice of Proposed Rule Making that proposed a streamlined

[26] Order at para. 4 and n. 11. The Order does not mention the supplemental letter from the ACC to the Commission, with copies to the Bureau staff, dated April 9, 2008, a copy of which is provided at Attachment B ("ACC 2008 Letter").

process of modifying study area boundaries for ILECs transferring territory.[27] In that NPRM the Commission stated:

> …[T]he frozen study area definition does not work well in situations involving mergers of study areas or arms-length sales of exchanges. For example, if carrier A sells an exchange to carrier B, and we insist on maintaining the frozen study area boundaries, carrier A's study area would include costs for an exchange it no longer owns and carrier B's study area would not include costs for an exchange it does own. *We do not believe that such anomalous and burdensome results are necessary to achieve our stated objective.*[28]

The Bureau's Order creates exactly the anomalous and burdensome results the Commission warned about in the NPRM.

E. With no precedent for denial, the Bureau had no authority to act[29]

The obvious purpose of the rule is to reserve policy decisions to the Commission itself, but here the Bureau has created new policy on its own hook. Whether or not that policy is sound, or would be adopted by the Commission, the Bureau has no authority to adopt it. This Section and Sections III, IV and V, below explain in detail why the Bureau Order fails to recognize relevant and material facts and adopts a new policy inconsistent with existing policies and precedents. Specifically, there is no history of a denial of a study area waiver petition under similar facts; the Order is inconsistent with the Commission's expressed policies regarding participation of rural telephone companies in the NECA tariffs and pools; the Order is inconsistent with the statutory

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[27] *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* Notice of Proposed Rulemaking, CC Doc. No. 80-286, 5 FCC Rcd 5974. The proposed rules were never adopted.

[28] *Id.* at 5976. (emphasis added) In the present case, of course, Carrier A (Qwest) had no costs in the area, but Accipiter (carrier B) has invested approximately $1.8 million in the area and has the ongoing obligations of a carrier of last resort under state law.

[29] "[T]he Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." 47 C.F.R. 0.291

policies of congruence of ETC designated service areas and rural telephone company study areas, the special interconnection obligations of Section 251(c), and the obligation of the Commission to coordinate with its state counterparts.

When faced with a study area waiver with an over 1% impact on USF in 1995, the Bureau sent the petition to the Commission for decision, which adopted the three-prong test. Thereafter the Bureau decided all cases under delegated authority until presented with the Heart of Iowa petition involving an acquisition of an exchange from another carrier where Heart of Iowa already operated as a CLEC. The Commission decision conditioned grant of the waiver on the carrier agreeing that its former CLEC lines would be treated "as if " they were covered by Section 54.305 , The Bureau then imposed the same condition in the Partner Petition.[30] These decisions show the Bureau has previously recognized that issues outside of existing precedent must be decided by the Commission. The Bureau can follow existing policy but it cannot adopt new policies as it has done here. The Order finds, in effect, that a waiver should be denied if there is no USF impact: the mirror image the long standing policy that waivers should be denied if they have too much USF impact.

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[30] *Heart of Iowa Communications Cooperative and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules,* Order, FCC 06-29, 21 FCC Rcd 2858 (2006); *Partner Communications Cooperative and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* Order, DA 06-944, 21 FCC Rcd 4406 (WCB 2006).

F. Even if Bureau had authority, it failed to explain its decision.

The Administrative Procedure Act requires that an agency denying a petition must include a "brief statement of the grounds for denial."[31] The D.C. Circuit recently explained that means, "…the agency must explain why it decided to act as it did. The agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate' a satisfactory explanation of its action….an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of Section 706."[32]

The Bureau Order does not meet this standard. The Order says petitioners have not met their burden of proving special circumstances granting a waiver, such as a compelling need to receive additional high-cost support. Because Accipiter abandoned any claim for additional high cost support there is no reason to establish a compelling need for such support. The Order does not "articulate a satisfactory explanation." The Bureau says it does not understand why Accipiter would want the waiver having foregone USF, but never recognizes that there are policy and precedent issues involved, much less explain why those policies and precedents were not followed.

III THE BUREAU ORDER FAILS TO RECOGNIZE THE PURPOSE OF AN ILEC'S STUDY AREA AND THE NON-USF REASONS FOR THE PETITION STATED ON THE RECORD

The Order states that because Accipiter agreed to "forgo additional high cost support, it is not clear on the record before us why it continues to seek a study area

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31 5 U.S.C. 555(e).

32 *Butte County California v. Hogen,* No. 09-5179 ___F.3d____ (D.C. Cir. 2010)

waiver at all."[33] The record before the Bureau was explicitly stated that participation in NECA's tariffs and pools for Accipiter's lines in the subject area was an additional basis for the request independent if the receipt of USF. The Order does not indicate that the Bureau was aware of these statements, but if it considered them "not clear" it was obligated to explain what was unclear about them. The Joint Petition stated:

> The Commission has recognized that failure to waive the rule in the case of the sale of exchanges would produce an absurd result, forcing the seller to continue to include exchanges in its study area for which it has no costs, and preventing the buyer from including in its study area exchanges it already serves. Such a result would not serve the Commission's policy objective of ensuring that carrier's actual costs are reflected in their accounting so that they can accurately set just, reasonable and non-discriminatory rates. Logically, the same principles should apply to Accipiter's proposed extension of its study area.[34]

The Joint Petition also asked for waiver of Section 69.3(e)(11) of the Commission's rules, if necessary in order to include the new lines in the NECA pool upon approval of the Petition on the effective date of grant. In Reply Comments, Petitioners directly responded to opposition comments of AT&T with the statement:

> ….universal service support is only one of a number of reasons why carriers require waiver of the Commission's rule freezing study areas at their 1984 boundaries. A study area, as AT&T well knows since it invented the concept, is the area over which a regulated carrier applies the Commission's accounting, jurisdictional separations and access charge rules. As cited in the Petition, the Commission recognizes it would be absurd for a carrier to include exchanges in its study area for which it has no cost, or to prevent a carrier which actually serves the area, from including it in its study area. *Recognition of study area boundary changes is necessary whether universal service support is expected or not.*[35]

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[33] Order at para. 12. Note 23 of the Order recognizes that Accipiter has agreed to forgo High Cost Support and ICLS.

[34] Joint Petition at 4, citing *Amendment to Part 36 of the Commission's Rules and Establishment of a Joint Board,* Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5975-76 (1990).

[35] Reply Comments of Joint Petitioners, Jul. 31, 2006, at 3, emphasis added, internal citations omitted.

Subsequently , NECA filed a letter stating that it had reviewed the petition and had "no objection to continuing to provide tariff pool administration services to Accipiter or to including future lines resulting from this transaction in the NECA tariff…."[36]

The Bureau Order ignores these unambiguous statements on the record as well as its expert knowledge of regulation of ILECs, including the interplay between Parts 36, 54 and 69 of the rules. The Bureau thus fails to even address the impact of its Order on a policy that has been a central component of the Commission's regulation of rural telephone companies for over 25 years.

IV THE BUREAU ORDER DIRECTLY CONFLICTS WITH THE CONCLUSIONS OF THE STATE COMMISSION WITHOUT IDENTIFYING ANY OVERRIDING FEDERAL PURPOSE

Following the Supreme Court's lead in *Smith v. Illinois Bell* establishing station-to-station rather than board-to-board separations, the Communications Act has always recognized that telephone companies are subject to regulations affecting the same facilities by both the federal and state jurisdictions. The legitimacy of state interests and the need for close cooperation between the jurisdictions was emphasized by the amendment requiring a federal-state joint board to issue a recommended decision in proceedings prescribing separations.[37] The 1996 Act shifted the balance by giving states responsibilities for implementation of federal policies, such as designating ETCs and

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[36] Letter from Tracey E.J. Saltenberger, NECA to Marlene H. Dortch, CC Doc. No. 96-45, Aug. 25, 2006.

[37] 47 U.S.C. 410(c).

arbitrating interconnection agreements.[38] Under the current dual regulatory regime for telephone companies, conflicts between state and federal regulations are addressed either by reference to direct preemption provisions, such as Section 253(d) or by "impossibility analysis" that looks to whether the interstate and intrastate components of a regulation cannot be separated or whether the state regulation conflicts with an established federal purpose.[39]

The Bureau Order does not directly purport to preempt the decision of the Arizona Commission, but its practical effect is to thwart the objectives and intent of the ACC to establish Accipiter as the ILEC for all of the Vistancia development, including the south portion in what was formerly Qwest's certificated area. The Order places Accipiter in a never-never land of being both an ILEC and CLEC in the same place. The only certainty to Accipiter's regulatory status being that whatever it may try to do to comply with both regimes will undoubtedly be found to have been wrong by one or the other or both. The Order thus constitutes at least a *de facto* preemption of the state. Applying impossibility analysis, once USF was no longer a factor, the state's realignment of the companies' service area boundaries has no conflict whatever with any federal goal, policy or rule either identified in the Order or elsewhere.

> As the ILEC holding the CC&N to serve Vistancia, Zona is the carrier of last resort within the Extension Territory which includes the Vistancia master planned development and other non-developed rural land. In our Decision 67574 the Arizona Commission held that Zona's CC&N extension request was in the public interest…. We encourage the FCC to do the same and approve the study area waiver.[40]

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38 47 U.S.C. 214(c), 252(e).

39 *See, Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986); *North Carolina Util. Comm'n v. FCC,* 537 F. 2d 787 (4th Cir. 1976).

40 ACC 2008 Letter at 2.

The Order does not recognize that the ACC will now have no clear means to establish Accipiter's intrastate costs as an ILEC because the south portion of those costs of providing intrastate regulated service in the four square mile area have been made not subject to the Separations Manual. Nor does the Order tell the ACC whether as a matter of federal law, Accipiter's ETC designation for that area remains valid even though the area is not a part of the rural telephone company's study area. These uncertainties and many more can only lead to further regulatory expense for Accipiter and the ACC that is totally unnecessary to serve any articulated federal concern.

Finally, as discussed above, the Order frustrates the efforts of the ACC to prohibit anti-competitive agreements between builders and developers.[41] Because the investigations of the ACC and the U.S. Department of Justice, instigated at Accipiter's request, led to cancellation of the restrictions. Cox is now rewarded with both an effective unregulated monopoly in South Vistancia and is freed from the previously confidential obligation to share revenue with the developer.

V THE BUREAU ORDER FAILS TO DO EQUITY OR EFFECTIVELY IMPLEMENT POLICY

The Bureau Order recognizes that in considering waiver requests the Commission "may take into account considerations of hardship, equity or more effective implementation of overall policy…."[42] Although the record is replete with facts raising

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[41] In the ACC proceeding on Accipiter's Formal Complaint against Cox Communications and the developer, Doc. No. T-03471A-0064, Arizona Commission staff testified that although the Settlement Agreement between Accipiter and Cox was in the public interest because it eliminated the private easement and the $1 million in discriminatory license fees, the settlement did not go far enough because it does not hold Cox sufficiently accountable for its conduct. Rebuttal Testimony of Elijah Abinah, June 15, 2006.

[42] Order at para. 6. citing *WAIT radio* and *Northeast Cellular*

issues of hardship, equity and policy implementation, the Order ignores all of them and controlling Commission precedent with the statement: "We find no circumstances of hardship or inequity that would warrant granting such a waiver."[43]

A. Commission Precedent Recognizes the Inequity of Denying Study Area Waivers Where the Parties Have Undertaken Substantial Burdens in Reasonable Expectation That Their Transfer Would Comply With Existing Guidelines.

In its precedent setting *U S West-Eagle Telecommunications* decision the Commission recognized that:

> "the parties negotiated their complex transaction and filed their petitions for waiver based on their reasonable expectations that the transfer would meet the more general standard the Commission has enunciated and applied in evaluating prior study area waiver requests. In light of the likely degree of burden which application of the 'one percent' guideline would impose on Petitioners…in would be *inequitable* to apply the 'one percent' guideline in these cases.[44]

Accipiter and Qwest incurred substantial expense to work out the agreements between the carriers and participate in the public hearings before the ACC with the reasonable expectation, based on the *Skyline* Order and more than (then) twenty years of grants of study area waivers.[45] The burdens on Accipiter will continue indefinitely if the Order is not reversed, because of the difficulties of operating as a partial ILEC/partial CLEC in the same location. Many rural telephone companies also operate as CLECs, but

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[43] Order at para. 12. The quoted sentence is footnoted to refer back to paragraph 5 which recites the amount of per line USF Accipiter currently receives and the forecasted additional amounts. Because these facts are entirely irrelevant following Accipiter's agreement to forego additional USF, the only apparent meaning to footnote 31 is that because Accipiter has high costs per loop the Commission should not grant any request involving Accipiter, no matter how meritorious, or consistent with long standing precedent.

[44] *U S West-Eagle Order* at para. 16.

[45] The ACC also incurred substantial expenses as discussed in Section IV, *supra.*

in areas where some other carrier is the ILEC and whether in their ILEC or CLEC territories, their federal and state regulatory status is the same. Here the Bureau purports to create a hybrid for which the accounting and regulatory standards are at best unclear if not non-existent.

In *U S West/Eagle* the Commission, in recognition of the equities and burdens on the parties involved, granted a study area waiver where the impact on the USF was greater than one percent. Accipiter and Qwest incurred comparable burdens and a grant would have had no USF impact at all, but the waiver was denied. The Order does not acknowledge either the inequity to Accipiter and Qwest or the precedent of the *U S West/Eagle* Order, but says only: "We find no circumstances of …inequity…"[46] At a bare minimum the law requires the Bureau to acknowledge the disparity in treatment and explain why it did not follow the Commission's precedent.

B. The Order is contrary to "Effective Implementation of Policy"

1. Denial of waiver is unrelated to any stated purpose of freeze of SA boundaries

Prior to the 1984 freeze, the Commission did not purport to regulate the establishment or boundaries of study areas. The sole stated purpose of the order freezing study area boundaries was to prevent carriers from subdividing their study areas into high and low cost study areas in order to maximize their USF receipts.

Accipiter's agreement to forego all USF unequivocally meant that grant of the waiver would in no way contravene the Commission's policy of limiting USF increases

[46] Order at para. 12. The Order at para. 6 cites *U S West/Eagle* as establishing the test to be applied but does not address the fact that the Commission found it would be inequitable to apply it retroactively.

resulting from realignment of study area boundaries. Accipiter and Qwest voluntarily agreed, subject to regulatory approval, to revise the boundaries. There was no sale, Qwest gave up no facilities or customers and received no direct or indirect USF benefit.

The Bureau's Order is inherently arbitrary and capricious. It is not effective implementation of policy to apply a rule to situations that bear no relationship to the purpose of the rule. It is contrary to effective policy implementation to refuse to grant a waiver where grant of the waiver would have no adverse impact on one policy (USF limitation) but has material adverse effects on a multiplicity of other policies, several of which are described in this Application for Review.

2. The Communications Act favors designations of ETCs everywhere there are subscribers.

Accipiter agreed to forego High Cost Support, Local Switching Support and ICLS as a condition to grant of the Petition. The Act and the Commission's rules also provide direct benefits to subscribers in the Low Income and Rural Health Carrier mechanisms. These programs provide funds only to carriers designated under Section 214(e). If Accipiter withdraws as the designated ETC from the four square mile area, there will be no ETC eligible to provide service at discount to low income subscribers or rural health care providers.[47]

Assuming, however, that Accipiter does not request to withdraw its ETC designation for the area, or is lawfully prohibited from doing so, the Order raises the question of whether the ACC's designation remains valid. The ACC designated

[47] Section 214(e)(4) governs the withdrawal of an ETC where there are other ETCs, but is silent about situations in which no other carrier has been designated as an ETC. At present there have been no requests for Link-up or life-line service or rural health care discounts from the subject area, and the Vistancia development portion of the four square miles is all new housing.

Accipiter as the ETC in the area, and withdrew Qwest's designation on the implicit assumption that the Commission would adjust the respective study area boundaries. Section 214(e)(2) states that state commissions designate common carriers as eligible telecommunications carriers for a service area designated by the state commission. Section 214(e)(5) provides that in the case of a rural telephone company such as Accipiter the service area shall be the company's study area. Because the result of the Bureau Order is that the four square mile area remains in Qwest's study area, the ACC's designation appears invalid as to Accipiter and the area is without an ETC.

3. The Order is contrary to the Commission's policy behind the creation of NECA

The direct effect of the Bureau Order is that it prohibits Accipiter from including lines in the four square mile area in the NECA interstate access tariffs and pools. NECA has explained why it will not accept the cost or revenues as follows:

> Since the FCC does not regulate local exchange service territories or franchises per se, it appears that the "frozen study area rule" applies only to telephone company accounting, separations, and tariffing practices. Under this interpretation, a telephone company would not be required to obtain a waiver of the rule to offer local exchange service outside its study area boundary, but would be required to obtain a waiver to include the costs and revenues associated with providing such service in its interstate tariffs and USF data reports. This, in turn, suggests that NECA should not accept data on investment, expenses, revenues or lines associated with access service provided outside of a company's frozen study area boundary unless the FCC grants a waiver of the study area rule.[48]

[48] NECA Cost Issue 8.5, Revised January 2006, 2. (internal citations omitted). In order to be a member of NECA and to participate in the NECA tariffs and pools, a carrier must be an incumbent LEC. *See* 47 C.F.R. § 69.2(hh). Accipiter is a member of NECA as the successor to Qwest in its existing study area and is the successor to Qwest in the four square miles, which could mean that it is also the ILEC there. If Accipiter is an ILEC under the Communications Act in the four square miles, the Bureau Order creates a

The Commission required the creation of NECA and provided regulation for the filing of access tariffs and operation of its pools for specified policy reasons including minimizing the number of tariffs filed with the Commission, promoting uniformity in access charges consistent with the rate integration goals of Section 254(g), and ensuring revenue stability for small ILECs.[49] As the Commission is aware, Accipiter's existing study area is very low density and hence very expensive to serve. Incorporation of the more dense area in question in Accipiter's study area would have had the effect of reducing its average unit costs. The Bureau's Order ignoring, and thereby denying, any public interest benefits of small carrier participation in NECA is directly contrary to a prior Bureau decision in which it said:

> Participation in NECA will allow Sandwich Isles to avoid the costs of filing and maintaining its own company-specific interstate tariffs. Because Sandwich Isles is a relatively small company, the costs of preparing company-specific tariffs could be disproportionately excessive. In addition, because Sandwich Isles has made large capital investments to provide service, its company-specific rates have the potential to be extremely high over the long term. Therefore, it is in the public interest to permit Sandwich Isles and its customers to benefit from the cost savings and lower rates available through NECA participation.[50]

4. The Order encourages the creation of anti-competitive agreements, contrary to the Commission's Multi-Tenant Environment Policies.

Accipiter put extensive details on the record describing how it was thwarted from extending service into the newly certificated area including South Vistancia by an anti-

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situation where there is ILEC area not eligible to participate in the NECA tariffs and pools in violation of Part 69, but it does not even recognize this anomaly.

[49] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983).

[50] Sandwich Isles Order, para.28.

competitive agreement between Cox Communications and the developer.[51] That agreement provided that prior to constructing any telecommunications facilities a service provider would have to pay a fee of $500,000 for each of the three sections of the development, that only Cox would be allowed to advertise its services in the model homes, and that Cox would share a substantial portion of its revenues with the developer.[52] Upon learning of the first two restrictions, Accipiter expended substantial time and resources in complaints to the ACC and the U.S. Department of Justice with the eventual result the agreement was terminated.

The Commission has gone to considerable effort to remove obstacles to competition resulting from exclusive contracts in multiple tenant environments ("MTEs").[53] In the video market, the Commission concluded that contractual agreements granting exclusive access for the provision of video service harm competition and broadband deployment.[54] Although the Vistancia development largely consists of individually owned homes, in the development phase when the utility trenches are opened, the developer has much the same degree of control as do the owners of MTEs and MDUs. The Commission's concerns should apply equally. Nevertheless, the result of the Bureau's Order will be that Cox's agreement will have been enormously successful and others may be encouraged to emulate it.

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51 ACC Certification Order at 7-9/

52 *Id.*

53 *See, Promotion of Competitive Networks in Local Telecommunications Markets,* Report and Order, 23 FCC Rcd 5385 (2008)

54 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

Cox was able to construct facilities as the sole provider in most of the development before the trenches were closed. Further, its one potential wireline competitor for telecommunications and broadband services has been seriously crippled by an unprecedented regulatory situation that creates a substantial incentive to withdraw. Finally, with the cancellation of the agreement Cox is relieved of the obligation to share revenue with the developers. Despite this unique situation in which Accipiter played a significant role at the expense of time and resources to promote fair competition, the Bureau Order says that the Petition presents no "special circumstances."

5. The Order is inconsistent with the *Skyline* policy that recognizes state certification as establishing study area boundaries.

If the *Skyline* principle is that state certification establishes study area boundaries, subject to Commission concerns regarding USF impact, then the Arizona Commission's certification of Accipiter for the area, and decertification of Qwest should have resolved the matter once Accipiter took USF issues off the table.[55] If state certification subject to FCC USF review does not establish study area boundaries, then perhaps the original definition of a carrier's area of operation controls. Since Qwest never "operated" in the area it cannot be said under that definition that the area was ever in its study area. Certainly it had no expenses or investment upon which to perform jurisdictional separations.

6. The Order leaves the area without a carrier subject to Section 251 (c) interconnection obligations

[55] As explained in Section IV, above, the ACC's actions addressed the second and third prongs of the *U S West/Eagle* test, i.e., it not only didn't object to grant of the waiver, but affirmatively found that grant would be in the public interest. At a minimum the Bureau is obligated to explain why the ACC's public interest finding should be disregarded as inapplicable or wrong.

In the Commission's two orders under Section 251(h)(2) it found the public interest would be served by classifying the carriers involved as ILECs for the purposes of Section 251 in order to promote the pro-competition policies of the 1996 Act. Grant of the order would potentially have brought those obligations to the Accipiter lines in the Vistancia development. The Bureau's Order leaves the area without a carrier subject to the enhanced interconnection obligations of Section 251(c) contrary to Congressional and Commission policy.

VI RELIEF REQUESTED

Accipiter has demonstrated above that, contrary to the decision of the Wireline Competition Bureau, grant of the Joint Petition of Accipiter and Qwest would serve the public interest. Accipiter has further demonstrated that the Bureau's decision is not rationally related to the accomplishment of any Commission policy or precedent and is contrary to multiple specific policies enumerated above. The Bureau decision constitutes a *defacto* preemption without justification or explanation of the decision of the state commission acting within its jurisdiction to establish the boundaries of exchange carriers.

Accipiter therefore respectfully requests that the Commission overrule the Bureau Order and directly grant the Petition. Accipiter further requests that the Commission act on this application expeditiously consistent with its obligation under Section 555(b) of the Administrative Procedure Act. Accipiter began the process to obtain regulatory approval to extend its service territory eight years ago and has been involved in a long,

difficult process every since. The delay and expense are particularly burdensome on a small company.

Respectfully submitted

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October 1, 2010

ATTACHMENT A

Attachment A
Selected Study Area Waivers

Qwest

Alltel	DA 05-3108
Cedar Valley	DA 05-4105
Citizens	DA 01-1536
DuBois	DA 10-895
El Paso Cty	DA 10-898
Iowa Telecom	DA 10-1232
Pine Tel.	24 FCC Rcd 4986 (2009)
RT Comm.	DA 10-899
Sacred Wind	DA 06-1645
Saddleback	DA 01-2777
Skyline	9 FCC Rcd 6761 (2004)
Sully Buttes	15 FCC Rcd 18810 (2000)

Qwest Pending

Pine Drive	PN DA 10-1366
Beaver Creek	PN: DA 07-4173

US West

S. Central Utah	9 FCC Rcd 194 (1993)
Blackfoot et al.	DA 93-1581
Triangle et al.	9 FCC Rcd 202 (1993)
Eagle	10 FCC Rcd 1771 (1995)
Leaco et al.	DA 96-1097
Albion et al.	DA 96-1462
Arapahoe et al.	DA 96-1894
Nemont	9 FCC Rcd 202 (1994)
Citizens	15 FCC Rcd 12916 (2000)
Rye	15 FCC Rcd 18738 (2000)
San Carlos Apache	11 FCC Rcd 14591

ATTACHMENT B

(electronically filed separately)